

APPEAL NO. 93522

On May 18, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding as the hearing officer. The hearing was held under the provisions of the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). The hearing officer determined that the appellant (claimant herein) was not injured in the course and scope of his employment on (date of injury); that the claimant gave timely notice of his injury to his employer; and that the claimant does not have disability since he did not sustain a compensable injury. The hearing officer decided that the claimant is not entitled to workers' compensation benefits under the provisions of the 1989 Act. The claimant disputes certain findings of fact and conclusions of law and requests that the decision of the hearing officer be reversed. The respondent (carrier herein) responds that the claimant's request for review was not timely filed; that the evidence supports the hearing officer's findings, conclusions, and decision; and requests that the decision be affirmed. The claimant's appeal was timely filed in accordance with the provisions of Article 8308-6.41(a); and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 143.3 (Rule 143.3).

DECISION

The decision of the hearing officer is affirmed.

The issues at the hearing were: 1) whether the claimant was injured in the course and scope of his employment with his employer, 2) whether the claimant gave timely notice of his injury to his employer; and 3) whether the claimant has disability. After the issues were agreed to by the parties, the parties stipulated that the claimant notified his employer of a work-related injury on (date of injury), thus removing timely notice as a disputed issue.

The claimant testified that on (date of injury), when he grabbed and lifted a 60 pound box from a rack in the employer's warehouse, he noticed "discomfort" in his back. He testified that since his supervisor was not around, he told a group leader, (Mr. W), that he was leaving work that day because he had problems with his back. Mr. W said in a recorded statement that the claimant never mentioned a back injury or back problem to him, but that the claimant had left work early on several occasions complaining about a fever. The claimant further testified that three coworkers he was working with on September 24th were aware that he had "discomfort" in his back and that he told them that he had a back problem. No statements from the coworkers mentioned by the claimant were in evidence. He said he took off work about noon that day, called into work the next day and told his supervisor, (Mr. B), that he had been injured at work the previous day, and then took off work until September 29, 1992. He returned to work on September 29th, worked a few days, and then took off work until October 18th. He worked from October 18th to October 22nd. The claimant said that on October 22nd the employer gave him "disciplinary action." He testified that the employer calculated the time he had taken off work since March 1992 and told him that he had "habitual absenteeism" and that he would not be allowed to miss any more work without "medical verification" or he would be terminated. The claimant said that after the discussion with his supervisor concerning absenteeism, he told his supervisor

on (date of injury), that he, the claimant, needed to see if he could get his back problem looked at by a doctor. The claimant did not see a doctor until October 23, 1992, when he saw (Dr. C). He subsequently chose to go to (Dr. H), and was also examined by (Dr. CA) at the request of the carrier. The claimant has not worked since (date of injury). He testified that his injury from September 24th has prevented him from working.

In a "Statement of Claim" for accident and sickness weekly benefits, dated October 29, 1992, the claimant indicated that he had not been injured in an accident and did not describe an accident in the space provided for that purpose on the form. However, in another "Statement of Claim" dated February 10, 1993, the claimant indicated that he was involved in an accident at work on (date of injury), when he had a sudden onset of pain in his "lower/mid" back when he was lifting in the warehouse.

The claimant's supervisor, Mr. B, testified that prior to (date of injury), he had had numerous conversations with the claimant regarding the employer's attendance policy. He said that the claimant took off work at noon on September 24th without permission, that he spoke to the claimant on September 25th regarding why the claimant left work and the claimant told him he had taken some "personal time" and did not mention an injury. Mr. B said that when the claimant called into work for the days the claimant took off during September and October 1992, the claimant never mentioned he had an injury. Mr. B said that in early October 1992, he and a person from the employer's human resources department had a meeting with the claimant to try to identify the cause of the claimant's absences. Mr. B said that the claimant only told them that he had a lot of legal problems and personal problems that he did not want to discuss. On (date of injury), Mr. B and the human resources person had another meeting with the claimant concerning the claimant's absenteeism. Mr. B said that the claimant was told that the claimant would need to document an emergency situation in order to miss more work. Mr. B said that after the meeting on October 22nd, the claimant told him that he needed to leave work because "I think I got hurt." Mr. B said that the claimant told him his back was hurting, but when Mr. B asked what caused it, the claimant said he didn't know. When Mr. B asked the claimant when it occurred, the claimant told him that he didn't know; that it "just kind of comes and goes." Mr. B said that he gave the claimant permission to leave work to see a doctor and that the claimant did not return back to work after (date of injury).

Dr. C reported that she had treated the claimant on October 23rd, October 31st, and November 4th of 1992. She described the nature of the injury as low back pain, lumbar strain, and left radicular pain. She indicated that there was no acute injury, that the claimant's pain began "insidiously" at work after repetitive lifting about two weeks prior to his visit to her on October 23rd. In a report dated January 12, 1993, Dr. H stated that he examined the claimant on that date for low back pain that the claimant said he had had since October 1992, and that the claimant related that he was not sure what brought it on. Dr. H reported that a review of x-rays of the claimant's lumbar spine demonstrated no evidence of fracture, dislocation, spondylolysis, or spondylolisthesis. He diagnosed "low back pain"

and recommended physical therapy, a psychological evaluation, and a magnetic resonance imaging scan. In a report dated April 29, 1993, Dr. CA reported that he had reviewed the claimant's records and performed a neurologic evaluation of the claimant on that date. Dr. CA said the claimant reported that he had low back pain at work on (date of injury). Dr. CA said he could find no neurologic reason for the claimant's continued pain and suspected that the claimant has no significant organic neurological defect. He further stated that "with the clinical constellation of findings, the most likely diagnosis would consist of malingering" and that "I can find no evidence of a work-related injury at the present time, dating from alleged injuries in the fall of last year." Dr. CA concluded his report by stating that his findings on examination of the claimant suggested "factitious responses on behalf of the patient."

The claimant disputes the hearing officer's Findings of Fact Nos. 3 through 10, and Conclusions of Law Nos. 2 and 4 on the grounds that those findings and conclusions are incomplete or incorrect based on the testimony and evidence. Having reviewed the record and the disputed findings and conclusions, we conclude that the findings and conclusions are supported by the evidence and are not against the great weight and preponderance of the evidence. See Johnson v. Employers Reinsurance Corporation, 351 S.W.2d 936 (Tex. Civ. App.-Texarkana 1961, no writ); Griffin v. New York Underwriters Insurance Company, 594 S.W.2d 212 (Tex. Civ. App.-Waco 1980, no writ). We further conclude that the hearing officer's findings support his conclusions and that his conclusions support his decision that the claimant was not injured in the course and scope of his employment and that he is not entitled to workers' compensation benefits. Without a compensable injury, the claimant does not have disability as defined by Article 8308-1.03(16). The evidence in this case was conflicting and the outcome turned largely on the credibility of the claimant. The hearing officer is the judge of the weight and credibility to be given to the evidence. Article 8308.6.34(e).

The decision of the hearing officer is affirmed.

Robert W. Potts
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge